Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 335

ROBERT NEADERLAND,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Robert Ash
Carl F. Bauersfeld
3900 Wisconsin Avenue, N.W.
Washington, D.C. 20016
Attorneys for Petitioner

Of Counsel:
Ash, Bauersfeld, Burton
& Mooers

Washington, D. C. THIEL PRESS 202 393 0625

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered April 10, 1970.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported and is printed in Appendix "A", *infra*, p. A-1.

The findings of fact and opinion of the Tax Court of the United States is reported in 52 T.C. 532 and is printed in Appendix "B", *infra*, p. B-1.

JURISDICTION

The judgment of the Court of Appeals was entered on April 10, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

QUESTION PRESENTED

The petitioner was indicted for fraudulent tax evasion in the United States District Court for the Southern District of New York for the years 1954 and 1955. At the trial on March 15, 1965, after the Government rested its case and before the petitioner opened his case, the Court granted the petitioner's motion for a directed verdict of acquittal. On August 19, 1966, the Commissioner of Internal Revenue issued a notice of deficiency for the years 1954 and 1955 asserting a 50 percent fraud penalty under Section 6653(b) of the Internal Revenue Code. Taxpayer appealed the proposed deficiency to the Tax Court, contending that the Commissioner was estopped from relitigating the fraud issue. The Tax Court held against the taxpayer and the Court of Appeals affirmed on appeal.

Is the Commissioner estopped from relitigating the issue of fraud where the same degree of proof was involved in both the criminal and civil cases?

STATUTES INVOLVED

Internal Revenue Code of 1954

SEC. 6653. FAILURE TO PAY TAX.

* * *

(b) *Fraud.* If any part of any underpayment (as defined in subsection (c)) of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 50 percent of the underpayment. In the case of income taxes and gift taxes, this amount shall be in lieu of any amount determined under subsection (a).

* * *

SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

STATEMENT OF THE CASE

The pertinent facts may be summarized as follows:

In May 1957 the Internal Revenue Service initiated an investigation of the petitioner's federal income tax returns for 1954 and 1955. Petitioner was eventually advised that criminal proceedings were contemplated after the investigation.

On April 11, 1961, the Grand Jury returned an indictment to the United States District Court for the Southern District of New York charging in two counts that the petitioner willfully and knowingly attempted to evade and defeat a large part of his income taxes due and owing by him to the United States of America for the years 1954

and 1955, in violation of 26 U.S.C. § 7201. On April 18, 1961, petitioner, as defendant, was arraigned and entered a plea of not guilty to the charges set forth against him in said indictment. On March 10, 1965, a trial was begun in the United States District Court for the Southern District of New York before a jury. On March 18, 1965, after the Government rested its case and before the petitioner, as defendant, opened his case, the United States District Court granted defendant's motion for judgment of acquittal. (Appendix, p. B-7 - B-8)

On August 19, 1966, the Commissioner of Internal Revenue issued to the petitioner a notice of deficiency covering the years 1954 and 1955 which asserted the 50 percent fraud penalty provided by Section 6653(b) of the Internal Revenue Code. On November 3, 1966, the petitioner petitioned the Tax Court of the United States for a redetermination of the deficiencies for the years 1954 and 1955. As a basis of his action in the Tax Court, the petitioner contended, *inter alia*, that the Commissioner was estopped from litigating the deficiencies at issue since the petitioner had been granted a judgment of acquittal in the prior criminal tax case where there was no difference in the quantum of proof required in a civil or criminal case to send a case to the jury. After a trial in the Tax Court, on June 25, 1969, the Tax Court filed its findings of fact and opinion which disposed of the estoppel issue adverse to the position of the petitioner. On September 15, 1969, the case was appealed to the United States Court of Appeals for the Second Circuit which affirmed the judgment of the Tax Court in an opinion rendered April 10, 1970. (Appendix, p. A-3)

REASONS FOR GRANTING THE WRIT

1. The decision below is in conflict with the decision of this Court in *Coffey* v. *United States* (1886), 116 U.S. 436, in rejecting the doctrine of collateral estoppel and per-

mitting the relitigation of the fraud issue. The Court of Appeals declined to apply the doctrine of collateral estoppel on the ground that there are "substantial dissimilarities between the legal principles governing the civil suit and those which were applicable in the criminal prosecution which preceded it." In *Coffey* the defendant was tried in a criminal case under Section 3257 of the Revised Statutes for defrauding or attempting to defraud the United States of tax on the spirits distilled by him and was acquitted. Thereafter, a civil action *in rem* was brought against Coffey by the United States under Section 3257 for forfeiture of the distilled spirits and certain property. This Court held that the acquittal in the criminal case was a bar to the civil suit and said:

> "It is true that § 3257, after denouncing the single act of a distiller defrauding or attempting to defraud the United States of the tax on the spirits distilled by him, declares the consequences of the commission of the act to be (1) that certain specific property shall be forfeited; and (2) that the offender shall be fined and imprisoned. It is also true that the proceeding to enforce the forfeiture against the *res* named must be a proceeding *in rem* and a civil action, while that to enforce the fine and imprisonment must be a criminal proceeding, as was held by this court in *The Palmyra*, 12 Wheat., 1; 14. Yet, where an issue raised as to the existence of the act or fact denounced has been tried in a criminal proceeding, instituted by the United States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person, on the subsequent trial of a suit *in rem* by the United States, where, as against him, the existence of the same act or fact is the matter in issue, as a cause for the forfeiture of the property prosecuted in such suit *in rem*. It is urged as a reason for not allowing such effect to the judgment, that the acquittal in the criminal case may have taken place because of the rule requiring guilt to be proved beyond a reasonable doubt, and that,

> on the same evidence on the question of preponderance of proof, there might be a verdict for the United States, in the suit *in rem*. Nevertheless, the fact or act has been put in issue and determined against the United States, and all that is imposed by the statute, as a consequence of guilt, is a punishment therefor. There could be no new trial of the criminal prosecution after the acquittal in it, and a subsequent trial of the civil suit amounts to substantially the same thing, with a difference only in the consequences following a judgment adverse to the claimant."

In the recent case of *Ashe v. Swenson* (decided April 6, 1970), U.S. , 25 L. Ed. 2d 469, the *Coffey* case was cited with approval and it was stated:

> "'Collateral estoppel' is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties *in any future lawsuit*." (Emphasis ours.)

The doctrine of collateral estoppel is as applicable to decisions of criminal courts as to those of civil jurisdictions. *Lough Motors Corp. v. General Motors Corporation*, 340 U.S. 558 (1951); *Travis v. Mangum*, 237 U.S. 309 (1915); *Scallon v. United States*, 332 U.S. 575 (1948); *Ashe v. Swenson*, U.S. , 25 L. Ed. 2d 469 (1970).

The doctrine of collateral estoppel operates to prevent the relitigation in a civil proceeding of an issue resolved in favor of the Government in a prior criminal action. *Local 20, Intl. Bhd. of Teamsters v. United States*, 291 U.S. 293 (1934). Thus, where a taxpayer has been convicted of wilfully attempting to evade taxes, it is well established that he is estopped from contesting the issue of fraud in a subsequent civil proceeding initiated under section 6653(b) of the Code. *Moore v. United States* (CA-4, 1965), 360

F. 2d 353, *Ajmos v. Commissioner* (CA-4, 1965), 360 F. 2d 358, *Tomlinson v. Lefkowitz* (CA-5, 1964), 334 F. 2d 262. The rationale supporting such application of the doctrine is that the term "willfully attempt to evade", which establishes criminal liability, necessarily includes the elements of "fraud" as that term is used in section 6653(b) of the Internal Revenue Code. *Tomlinson v. Lefkowitz, supra*.

Generally, the Commissioner is not barred from raising in a civil proceeding an issue on which it lost in a criminal case because of the difference in degree of proof required in the two types of proceedings. *Stone v. United States*, 167 U.S. 178 (1897). In a criminal action the Government has the burden of proving guilt beyond a reasonable doubt, while in a civil action it must establish its case by a preponderance of the evidence. Thus, in *Helvering v. Mitchell*, 303 U.S. 391 (1937), the Court, citing the *Stone* case, held that the doctrine of *res judicata* did not bar the Commissioner from imposing a civil tax fraud penalty where the taxpayer had been acquitted by a jury on a prior criminal charge involving the same taxable years. The Court found that "the acquittal was 'merely . . . an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused.'"

Where acquittal on a criminal charge does not result from the Government's failure to prove guilt beyond a reasonable doubt, logic compels application of the doctrine of collateral estoppel to bar relitigation of the same subject matter in a subsequent civil proceeding. As the Tax Court observed in the instant case:

> "It must be admitted that an even handed application of the law of estoppel would seem to call for the estoppel preclusion if the first judgment in the earlier case rests upon no higher degree of proof than the standard applicable here in this civil case." (App. p. B-15)

In the instant case the issue of fraud was decided adversely to the Government in the criminal proceeding by

means of a directed verdict of acquittal. Under Rule 29 of the Federal Rules of Criminal Procedure, a court shall order entry of judgment of acquittal "if the evidence is insufficient to sustain a conviction." In the Second Circuit, a case must go to the jury if there is substantial evidence to support the charge even though it might not be enough to satisfy reasonable men beyond a reasonable doubt. The opinion below states: (App. p. B-15) (A.)

> "The rule which the trial judge was required to apply in this Circuit in deciding the motion was that a criminal case must be submitted to the jury unless the prosecution has failed to present 'substantial evidence' to support a guilty verdict. [ ] citing cases] Even under these circumstances, where a similar standard of the burden of proof applies both to criminal and civil cases, the doctrine of collateral estoppel may not apply."

The doctrine of collateral estoppel was developed to prevent repetitious litigation of resolved issues. *Cromwell v. County of Sac*, 94 U.S. 351 (1876); *Commissioner v. Sunnen*, 333 U.S. 591 (1948). The decision below is in conflict with this firmly established principle of law that when a court of competent jurisdiction enters a final judgment on the merits of a cause of action all issues actually litigated and determined cannot be relitigated in a subsequent proceeding. In an effort to circumvent the doctrine, the Court below points out certain procedural differences between the trial of a criminal case and that of a civil case. These procedural differences are not of sufficient moment to overcome the great policy of the law that relieves both the Government and all other litigants of redundant litigation. The Court below further points out that the Government cannot appeal from an acquittal. The doctrine of collateral estoppel does not depend upon the existence or non-existence of the right of appeal. *Johnson Company v. Wharton*, 152 U.S. 252 (1894). The opinion below cites no authority for its holding that where a similar standard of the burden of proof applies both to criminal and civil cases, the doctrine of collateral estoppel may not apply

because of certain procedural differences between the trials of a criminal and a civil case. This holding is in conflict with the decisions of this Court cited above.

This case presents an important question affecting the administration of the federal tax laws which has not been, but should be, settled by a decision of this Court. As pointed out on page 6, where a taxpayer is convicted of willfully attempting to evade taxes, he is estopped from contesting the issue of fraud in a subsequent civil proceeding. The Tax Court in this case recognized that "even handed application of the law of estoppel would seem to call for the estoppel preclusion if the first judgment in the earlier case rests upon no higher degree of proof than the standard applicable here in this civil case." The Court of Appeals, while holding that the degree of proof was the same in both criminal and civil cases, nevertheless held that the doctrine of collateral estoppel did not apply. In *Ashe v. Swenson*, ___ U.S. ___, 25 L. Ed. 2d 469 (decided April 6, 1970), the Court in referring to collateral estoppel stated that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit" and cited the case of *United States v. Kramer* (CA-2, 1961), 289 F.2d 909, at 913, as follows:

> "* * * As a rule of federal law, therefore, '[i]t is much too late to suggest that this principle [collateral estoppel] is not fully applicable to a former judgment in a criminal case, either because of lack of 'mutuality' or because the judgment may reflect only a belief that the Government had not met the higher burden of proof exacted in such cases for the Government's evidence as a whole although not necessarily as to every link in the chain.'"

Even handed application of the doctrine of collateral estoppel and fairness dictate that the doctrine be equally available to both taxpayer-defendants and the Government. The writ should be granted to settle this extremely important question.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT ASH
CARL F. BAUERSFELD
3900 Wisconsin Ave., N.W.
Washington, D.C. 20016
Attorneys for Petitioner

Of Counsel
Ash, Bauersfeld, Burton & Meoers

June 23, 1970

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 435—September Term, 1969.

(Argued February 26, 1970 Decided April 10, 1970.)

Docket No. 34056

ROBERT NEDERLAND,

Appellant,

—v.—

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

Before:

LUMBARD, *Chief Judge,*
ANDERSON, *Circuit Judge,* and DOOLING, *District Judge.**

Appeal by taxpayer from decision of the Tax Court, Mulroney, *Judge,* holding that acquittal of taxpayer by trial judge on taxpayer's motion at close of Government's case in prior criminal prosecution, arising out of same facts, did not collaterally estop Commissioner in present civil action. Affirmed.

CARL F. BAUERSFELD, Esq., Washington, D. C. (Robert Ash, Esq., and Ash, Bauersfeld, Burton & Mooers, Washington, D. C., on the brief), *for Appellant.*

* Of the Eastern District of New York, sitting by designation.

John M. Brant, Esq., Department of Justice, Washington, D. C. (Johnnie M. Walters, Assistant Attorney General, Lee A. Jackson, Esq., and Joseph M. Howard, Esq., Department of Justice, Washington, D. C., on the brief), *for Appellee*.

Anderson, *Circuit Judge*:

Taxpayer Robert Neaderland was employed by Douglas L. Elliman & Co., Inc., of which he was a vice president and director, during 1954 and 1955 as a New York City real estate broker-salesman. He earned commissions of $88,573.31 and $96,307.23 from his employer for these two years and claimed business expense deductions of $31,000 and $38,000, respectively, in his 1954 and 1955 federal personal income tax returns.[1] These deductions were based largely on undocumented costs allegedly incurred in entertaining customers.

The Internal Revenue Service initiated an investigation of these returns in 1957 which resulted in Neaderland's indictment in 1961 on charges of willfully attempting to evade payment of income tax by filing false and fraudulent returns, in violation of 26 U.S.C. §7201. His jury trial began March 10, 1965, and at the close of the Government's case on March 15th, the taxpayer's motion for a judgment of acquittal was granted.

In 1962 Neaderland filed "amended" returns for 1954 and 1955 in which he reduced his claimed business expense deductions to $12,176.33 and $17,909.13, respectively, and

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1 It has been stipulated that the deductions originally claimed were excessive by at least $18,823.67 and $20,090.87, the amounts by which they exceeded the deductions claimed in 1962.

paid approximately $27,500 in additional taxes. The Commissioner, however, in August of 1966 determined that only $2,000 was allowable to the taxpayer as a business expense deduction in each of those two years and computed and fixed deficiencies and penalty additions to Neaderland's tax of almost $48,000 under 26 U.S.C. §6653(b), because of fraud in the initial 1954 and 1955 returns. On appeal, the Tax Court found that the taxpayer had not carried his burden of proving deductions larger than the $2,000 allowed. It also found, largely from the confusion and evasiveness of Neaderland's own testimony, that at least a part of the underpayment in 1954 and 1955 was due to fraud with intent to evade the tax, so that the statute of limitations was no bar to collection of these deficiencies.

The Tax Court further found no merit in Neaderland's argument that his prior acquittal in the 1965 criminal case barred a finding of fraud in the subsequent civil proceeding through the doctrine of collateral estoppel. This is the only issue before us on the present appeal. We affirm.

A taxpayer's prior acquittal of attempted tax evasion through fraud does not bar the Commissioner from proving his fraud civilly, whether the criminal acquittal was upon a jury verdict, *Helvering* v. *Mitchell*, 303 U.S. 391, 397-8 (1938), or upon a motion for judgment of acquittal pursuant to F.R. Cr. P. 29, *United States* v. *Real Estate Boards*, 339 U.S. 485, 492-4 (1950). This rule, which declines to apply the doctrine of collateral estoppel, is based

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2 The deficiencies and additions determined were as follows:

Year	Deficiency	Addition to tax
1954	$ 7,521.24	$ 9,660.01
1955	14,611.56	15,181.76

The fifty percent penalty addition for fraud was computed on the original tax liability as determined by the Commissioner for each individual year, including a reduction in the original liability for the years after the filing of the amended return in 1962.

on a recognition of certain fundamental dissimilarities in the principles which govern the litigation of these virtually identical fraud issues in criminal and civil trials.

When a civil trial follows criminal proceedings which were based on the same facts, a different cause of action is involved and the doctrine of collateral estoppel rather than that of *res judicata* must be considered. 1B J. Moore, *Federal Practice* ¶ 0.418[1], p. 3701 (2d ed.). In *Cromwell v. County of Sac*, 94 U.S. 351, 353 (1877), Mr. Justice Field elaborated this doctrine as follows:

> "the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

In other words,

> "the judgment in the first suit operates as a collateral estoppel as to, but only as to, those matters or points which were in issue or controverted and upon the determination of which the initial judgment necessarily depended." 1B J. Moore, *supra*, ¶ 0.441[2], p. 3777.

This doctrine has been developed by the judiciary as a "reasonable measure calculated to save individuals and courts from the waste and burden of relitigating old is-

sues." *Tillman v. National City Bank of N. Y.*, 118 F.2d 631, 634 (2 Cir.), *cert. denied* 314 U.S. 650 (1941).

Collateral estoppel is confined, however, to "situations, where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged." *Commissioner v. Sunnen*, 333 U.S. 591, 599-600 (1948). Even if the issue is identical and the facts remain constant, the adjudication in the first case does not estop the parties in the second, unless the matter raised in the second case involves substantially "the same bundle of legal principles that contributed to the rendering of the first judgment." *Id.* at 602. Cf. *Ashe v. Swenson*, 38 U.S. L.W. 4295, 4297 (U.S. 4/7/70). The Court, therefore, held in *Sunnen* that a change in the applicable law between the first suit and the second prevented the operation of collateral estoppel.

Usually the doctrine has its application in situations involving two civil causes of action, but a criminal judgment which is final may have collateral estoppel effect in a subsequent civil suit involving an identical issue. See, e.g., *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558, 568-9 (1951); 1B J. Moore, *supra*, ¶0.418[4]. For example, courts have held that a taxpayer, who is convicted of a willful attempt to defeat or evade a particular tax, is estopped in a subsequent civil proceeding from contesting the issue of deficiency of payment due to fraud. See *Moore v. United States*, 360 F.2d 353 (4 Cir. 1965), *cert. denied* 385 U.S. 1001 (1967); *Amos v. Commissioner*, 360 F.2d 358 (4 Cir. 1965); *Tomlinson v. Lefkowitz*, 334 F.2d 262 (5 Cir. 1964), *cert. denied* 379 U.S. 962 (1965); *Armstrong v. United States*, 354 F.2d 274 (Ct. Cl. 1965); Vestal & Coughenour, Preclusion/Res Judicata Variables:

Criminal Prosecutions, 19 Vand. L. Rev. 683, 706 (1966); cf. *United States* v. *Carlino*, 400 F.2d 56 (2 Cir. 1968). But it is well established that the converse of this proposition is not true. When a jury acquits, it decides only that an accused is not proven guilty of the offense charged beyond a reasonable doubt, and the Commissioner is not foreclosed thereby from attempting to show fraud in the civil counterpart against the same defendant by a fair preponderance of the evidence. *Helvering* v. *Mitchell*, *supra*, at 397-398. This burden of proof factor alone is sufficient to demonstrate that the "bundle of legal principles" applicable in a civil suit differs significantly from that in a criminal trial.

The difference in applicable legal principles is no less apparent if a taxpayer, like Neaderland, is found not guilty of criminal fraud charges by the judge on a motion for acquittal. In most jurisdictions it is likely that the motion was granted because the judge was convinced that no reasonable man could find the defendant guilty beyond a reasonable doubt, see *United States* v. *Real Estate Boards*, *supra*, at 492-494. The rule which the trial judge was required to apply in this Circuit in deciding the motion was that a criminal case must be submitted to the jury unless the prosecution has failed to present "substantial evidence" to support a guilty verdict. *United States* v. *Consolidated Laundries Corp.*, 291 F.2d 563 (2 Cir. 1961); *United States* v. *Mayburg*, 274 F.2d 899 (2 Cir. 1960); *United States* v. *Masiello*, 235 F.2d 279 (2 Cir.), *cert. denied* 352 U.S. 882 (1956), *sub nom. Stickel* v. *United States*; *United States* v. *Gonzales-Castro*, 228 F.2d 807 (2 Cir.), *cert. denied* 351 U.S. 940 (1956); *United States* v. *Feinberg*, 140 F.2d 592 (2 Cir.), *cert. denied* 322 U.S. 726 (1944); cf. *United States* v. *Leitner*, 312 F.2d 107 (2 Cir. 1963). But see *United States* v. *Melillo*, 275 F. Supp. 314 (E.D.N.Y. 1967). See generally

8 J. Moore, *supra*, ¶29.06. Even under these circumstances, where a similar standard of burden of proof applies both to criminal and civil cases, the doctrine of collateral estoppel may not apply.

There are other factors besides burden of proof which so alter the comparability of the proof of the elements of the civil case with that of the prior criminal action that it would be illogical and prejudicial to the administration of the law to wrap fact determination in the civil action in the straitjacket of a prior decision in the criminal case. Application of equitable estoppel under these circumstances would operate as an unnecessary encumbrance upon and frustration of customary lawful proceedings in civil actions for the ascertainment of truth. Without justification for doing so, it would, in a civil action, have a preclusive effect upon the Government's presentation of a charge of fraud, on which it has the burden of proof.

These factors principally derive from the many constitutional safeguards which surround an accused in a criminal prosecution and which create wide differences between the "bundle of legal principles" which govern a criminal trial and those which apply to a civil suit. Their effect is most far-reaching in the permissible scope of proof. For example, the Government could not, in the criminal action, call Neaderland to the witness stand and examine him, though it was not barred from doing so in the subsequent civil case and thereby brought out highly probative evidence on the issue of fraud. Likewise, the Government's search for proof in a criminal case is hedged about by innumerable strictures whereas in civil proceedings there are pre-trial discovery and disclosure. Its effort to correct an error or initial failure of proof in a criminal trial may be barred by the prohibition against double jeopardy. Moreover, it

cannot appeal from an acquittal, like that entered in the criminal prosecution which was a prelude to the present case, to challenge the possibly erroneous standard which the trial judge applied in dismissing the case.

For these and other like reasons, the application of collateral estoppel against the Commissioner in this case would exemplify blind reliance upon doctrine in the face of obviously substantial dissimilarities between the legal principles governing the civil suit and those which were applicable in the criminal prosecution which preceded it.

Affirmed.

APPENDIX B

52 T.C. No. 57

TAX COURT OF THE UNITED STATES

[Filed: June 25, 1969]

ROBERT NEADERLAND,

Petitioner,

v. Docket No. 5943-66

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petitioner, a real estate broker, earned and reported commissions for the years 1954 and 1955 in the amounts of $58,573.31 and $96,307.23, respectively. On his returns for 1954 and 1955 he claimed business expense deductions in the amounts of $31,000 and $38,000, respectively. After petitioner was indicted for filing false and fraudulent returns for 1954 and 1955, he filed amended returns for said years taking business expense deductions in reduced amounts. The parties stipulated that the $31,000 in business expenses claimed as a deduction on petitioner's original 1954 return was excessive by at least $18,823.67, and the $38,000 in business expenses claimed as a deduction on petitioner's original 1955 return was excessive by at least $20,090.87. Other evidence reviewed and it is *held* that petitioner failed to sustain his burden of showing he was entitled to more than the $2,000 business expense deduction allowed by respondent for each of the years in issue.

Held, further, that respondent sustained his burden of proving that petitioner's underpayment of taxes for 1954 and 1955 was due, at least in part, to fraud with intent to evade tax.

Held, further, respondent is not estopped from raising the issue of fraud because the United States District Court for the Southern District of New York, in a prior criminal tax evasion case against petitioner for the same years, granted a motion for judgment of acquittal.

Carl F. Bauersfeld, for the petitioner.

Wallace Musoff and *Marwin J. Batt,* for the respondent.

MULRONEY, *Judge:* Respondent determined deficiencies in income tax and additions to tax for fraud under section 6653(b), I.R.C. of 1954,[1] against petitioner, as follows:

Year	Deficiency	Addition to Tax § 6653(b)[2]
1954	$ 7,521.24	$ 9,660.01
1955	14,611.56	15,181.76

The issues for decision are: (1) The correct amount to be allowed petitioner as business expense deductions in 1954 and 1955. (2) whether any part of the underpayment of taxes resulting from petitioner's overstatement of business deductions in each of the years in issue was due to fraud with intent to evade tax; (3) whether the statute of limitations bars assessment and collection of the deficiencies; and (4) whether the respondent is estopped from raising the issue of fraud where a U.S. District Court in a prior criminal tax evasion case for the same years granted a motion for judgment of acquittal.

[1] All section references are to the Internal Revenue Code of 1954, as amended, unless otherwise noted.

[2] The 50 percent penalty for fraud under § 6653(b) was computed on the original tax liability as determined by respondent for each year in issue. This original tax liability was reduced when petitioner in 1962 filed amended returns for 1954 and 1955 in which he paid additional sums of money as taxes for those years.

FINDINGS OF FACT

Some of the facts have been stipulated and they are found accordingly.

Robert Neaderland was a resident of New York, New York, at the time he filed his petition in this case. He filed his income tax returns for 1954 and 1955 with the district director of internal revenue, Upper Manhattan District, New York. The 1954 return was filed on or before April 15, 1955 and the 1955 return was filed on October 15, 1956, pursuant to an extension of time granted by the district director of internal revenue.

Petitioner filed "amended" income tax returns for 1954 and 1955 on February 26, 1962, and March 8, 1962, respectively, with the district director of internal revenue, Manhattan District, New York. The parties have stipulated that the $31,000 in business expenses claimed by petitioner as a deduction on his original 1954 income tax return was excessive by at least $18,823.67 and that the $38,000 in business expenses claimed by petitioner as a deduction on his original 1955 income tax return was excessive by at least $20,090.87.

During the taxable years 1954 and 1955 petitioner was employed by Douglas L. Elliman and Co., Inc., a real estate company, as a real estate salesman-broker. He was also a vice-president, a member of the Board of Directors and a stockholder of Elliman during the years in issue.

Petitioner's only sources of income during the years 1954 and 1955 emanated from Elliman and consisted of the following:

Source of Income	1954	1955
Commissions earned	$58,573.31	$96,307.23
Director's fees	225.00	280.00
Dividends	1,275.00	2,600.00
Total Income Earned	$60,073.31	$99,187.23

The commissions earned by petitioner represent his share of the gross commissions earned by Ellman as a result of petitioner's activities as a real estate salesman-broker.

The net amounts received by petitioner from Ellman during the taxable years in issue are as follows:

	1954	1955
Total earnings	$60,963.31	$89,187.23
Less:		
Withholding Tax	10,663.68	17,999.59
Other Deductions	1,070.83	640.85
Previous advance repaid	7,500.00	
Total Deductions from Earnings	$19,178.51	$17,940.44
Net Amounts Received	$41,784.80	$81,246.79

During the taxable years 1954 and 1955 petitioner maintained two bank accounts, both of which were checking accounts. One was with the Fifth Avenue Branch of the Bank of New York and the other was with the Sterling National Bank and Trust Company. He opened his account with the Sterling National Bank and Trust Company on June 9, 1954 with a $10,000 deposit consisting of funds transferred from his account maintained with the Bank of New York.

Petitioner either deposited to his bank accounts or cashed the net amounts of commissions earned, director's fees and dividends received from Ellman during the taxable years 1954 and 1955, as follows:

1954

Source	Amount	Cashed	Deposited Bank of N.Y.	Deposited Sterling National Bank	Total Income Deposited
Commissions	$44,894.80	$ 0	$35,527.07	$8,867.73	$44,894.80
Dividends	1,275.00	1,150.00	125.00	0	125.00
Director's fees	225.00	225.00	0	0	0
Totals	$45,894.80	$1,375.00	$35,652.07	$8,867.73	$45,019.80

1955

Commissions	$78,366.79	$ 0	$3,428.56	$74,938.23	$78,366.79
Dividends	2,600.00	2,600.00	0	0	0
Director's fees	280.00	280.00	0	0	0
Totals	$81,246.79	$2,880.00	$3,428.56	$74,938.23	$78,366.79

The only funds that petitioner had available to him during the entire years 1954 and 1955 consisted of withdrawals that he made from his two bank accounts and dividend and director's fees checks which he cashed.

The petitioner's total available funds and known personal expenditures for the taxable year 1954 are as follows:

1954

Total Funds Available for Expenditure:		
Withdrawals - Bank of New York	$31,982.02	
Sterling National Bank	5,724.72	
Total	37,706.74	
LESS: Transfer of funds, Bank of N.Y. to Sterling	10,000.00	
Balance	27,706.74	
ADD: Dividend checks cashed	1,150.00	
Director fees cashed	225.00	
Total Available		$29,081.74

Known Personal Expenditures		
Essex House Rent	2,459.88	2,459.88
Loans and Repayment of loans:		
Bank of N.Y. - repayment	500.00	
Lucille Lewis - repayment	3,900.00	
Ann Smith - loan	1,000.00	
Joe Baker - loan	500.00	5,900.00
Charitable and Other Contributions	925.00	925.00
Taxes:		
N.Y. State	809.32	
Federal	1,219.57	2,028.89
Capital expenditures:		
Cadillac	4,519.95	
Stock purchase	750.00	5,269.95
Miscellaneous Expense:		
Interest - Bank of N.Y.	5.73	
Mary Jacobs - Sister	625.00	
Fairview Heights Cemetery	124.00	
Mt. Zion Cemetery	41.00	
Hygrade Monuments	17.50	
Erickson Boat Delivery	501.74	
Morris Steinberg - Tailor	375.00	1,689.97
Total Known Personal Expenditures		$18,273.69

The petitioner's total available funds and known personal expenditures for the taxable year 1955 are as follows:

1955

Total Funds Available for Expenditures	
Withdrawals - Bank of New York	$ 6,316.01
Withdrawals - Sterling National Bank	19,329.66
Total	25,645.67
LESS: Bank Adjustment 2-2-55	100.00
Balance	25,545.67

ADD: Dividend check cashed	2,600.00	
Director fees cashed	280.00	
Total Available		$28,425.67
Known Personal Expenditures:		
Essex House Rent	2,459.88	2,459.88
Loans and Repayment of loans:		
Bank of N.Y. - repayment	1,000.00	1,000.00
Charitable and Other Contributions	1,530.00	1,530.00
Taxes:		
N.Y. State	798.64	
Federal	520.00	
		1,318.64
Capital expenditures:		
Cadillac	3,400.00	3,400.00
Miscellaneous Expense:		
Interest - Bank of N.Y.	25.56	
Mary Jacobs - Sister	625.00	
Fairview Heights Cemetery	145.00	
Morris Steinberg - Tailor	615.00	
Rollnick - Tailor	695.25	
		2,105.81
Total Known Personal Expenditures		$11,814.33

For the years 1954 and 1955 petitioner prepared his own income tax returns and utilized W-2 forms furnished by Elliman. On his 1954 return he took a deduction entitled "Business Expenses - Carfares - Taxi Fares, Entertainment of Customers, Etc. not reimbursed by Company $31,000.00." On his 1955 return he took a business expense deduction entitled "Travel & Entertainment Expenses not reimbursed" for $38,000.

In May 1957 the Internal Revenue Service met with petitioner concerning his 1954 and 1955 income tax returns.

He was eventually advised that criminal proceedings were contemplated and at that time he obtained counsel and secured the services of a certified public accountant.

On April 11, 1961, the Grand Jury returned an indictment in the United States District Court for the Southern District of New York, charging in two counts that petitioner Robert Neiderland did wilfully and knowingly attempt to evade and defeat a large part of his income taxes due and owing by him to the United States of America for the calendar years 1954 and 1955 by filing and causing to be filed false and fraudulent income tax returns by understating his income and income tax in violation of section 7201 of the Internal Revenue Code of 1954. On April 18, 1961, petitioner, as defendant, was arraigned and entered a plea of not guilty to the charges set forth against him in said indictment. On March 10, 1965, a trial was begun in the United States District Court for the Southern District of New York, before a jury. On March 15, 1965, after the Government rested its case and before petitioner, as defendant, opened his case, United States District Judge Sugarman granted defendant's motion for judgment of acquittal.

In 1963 petitioner filed "amended" returns for both taxable years 1954 and 1955 and paid additional amounts of money as taxes for each of those years in the respective amounts of $11,798.77 and $15,751.96. He took business expense deductions in reduced amounts in those amended returns as follows:

	1954	1955
Telephone	$ 400.82	$ 470.11
Auto Depreciation	2,000.00	2,000.00
Other Travel, Entertainment, etc.	9,775.51	15,439.02
Total	$12,176.33	$17,909.13

In his notice of deficiency dated August 1966, respondent determined that only $2,000 for each of the taxable years 1954 and 1955 was allowable as a business expense

deduction. He disallowed the rest by "reason of the fact that no evidence of information was submitted in substantiation thereof."

OPINION

The main issue before us is whether any part of petitioner's understatement of taxes for 1954 and 1955 was due to fraud with the intent to evade or defeat tax. We also must decide whether a business expense deduction issue for each year is allowable in excess of the amounts already allowed. Unless there is fraud the statute of limitations will operate to bar the collection of any deficiencies. As will be seen later, the issue of fraud is decided for respondent; therefore, we will turn first to the issue concerning the business deductions to determine the extent of petitioner's tax liability for each year in issue.

Respondent determined deficiencies in petitioner's income tax in the amounts of $7,521.24 for 1954 and $14,611.56 for 1955. In arriving at these determinations he allowed $2,000 for each year as business expenses. This means petitioner has the burden of proving that he is entitled to more than $2,000 for each year as business expense deductions already allowed by respondent. He must overcome the presumption of correctness that attaches to respondent's determination. Rule 32, Tax Court Rules of Practice; *Welch v. Helvering*, 290 U.S. 111 (1933).

Petitioner claimed in his amended returns filed in 1962 that he is entitled to business deductions for each year in the amount of $12,176.33 for 1954 and in the amount of $17,909.13 for 1955. No substantive documentary evidence was offered to support these business deductions taken by petitioner in his amended returns.

In an attempt to substantiate his deductions petitioner testified in a general and conclusory manner that he had a considerable amount of business expenses in each year in issue. He referred to some specific real estate transactions

he was involved in and customers he dealt with to show how his expenses arose stating that "I took customers to prize fights, I took them to ball games, I took them to shows. I took them to affairs. I took them to special dinners and I paid the bills." At no time did he match up any specific expense or amount with any specific person or place. When he was asked to substantiate his 1954 and 1955 expenses in 1957 by respondent's representative and then again at the trial he was unable to do it. He claimed that he had records but that they were lost. In reference to his alleged car expenses for business he testified that he "sometimes" recorded them on "pads", but at no time were any pads ever produced.

Evidently petitioner felt he could sustain his burden of proof by simply introducing into evidence cancelled checks, bank statements and a few receipts and testifying, generally, that his expenditures were for business purposes. This type of evidence in no way shows us for what purpose the expenditures were made. Other than his own general testimony he presented no records or proof of any substance as to the purpose for the expenditures he actually incurred. This kind of testimony does not provide a foundation for allowing disallowed expenses as "ordinary and necessary" business expenses.

Petitioner argues that pursuant to the decision in *Cohan v. Commissioner*, 39 F.2d 540 (C.A. 2, 1930), he is entitled to an estimated allowance of business expenses for 1954 and 1955. This is true only when petitioner's evidence indicates and shows that he had in fact incurred *business* expenses in excess of the amount already allowed. That is not the case here. Petitioner has failed to show he is entitled to more than was allowed.

Petitioner's testimony and evidence for 1954 and 1955 were so general and of such a summary nature that we cannot conclude for either year that he has sustained his burden of proof. *Reginald G. Hearn*, 36 T.C. 672 (1961), affd. 309 F.2d 431 (C.A. 9, 1962), certiorari denied 373 U.S. 909 (1963).

We now turn to the fraud issue under section 6653(b). On this issue, the burden of proof is on respondent to show that a part of the understatement of taxes for each year was due to fraud. He must; to sustain his burden, present clear and convincing evidence that petitioner knowingly understated his taxable income on his income tax return for each year with the specific purpose and intent of evading tax. Section 7454(a); *Charles E. Mitchell*, 32 B.T.A. 1093 (1935), affd. 303 U.S. 391 (1938); and *Arlette Coat Co.*, 14 T.C. 751 (1950).

Petitioner prepared his own 1954 and 1955 income tax returns and he took business deductions for each year in the respective amounts of $31,000 and $38,000. He now has admitted by filing amended returns in 1962, and by pleading admission, and by stipulation, and on brief, that the $31,000 deduction for 1954 was excessive by at least $18,823.67 and that the $38,000 deduction for 1955 was excessive by at least $20,090.87. The large amount of these admitted overstatements tends to nullify any thought of honest error. We have also held that petitioner failed to prove that he was entitled to business deductions for each of those years in excess of the $2,000 allowed each year by respondent. In other words, petitioner has understated his taxable income by deliberately grossly overstating his deductions. There is no doubt that for purposes of fraud an understatement of taxes can be accomplished by an overstatement of deductions as well as by an omission of income. *John McKeon*, 39 B.T.A. 813 (1939), and *Estate of Louis L. Briden*, 11 T.C. 1095 (1948), affd. sub nom. *Kirk v. Commissioner*, 179 F.2d 619 (C.A. 1, 1950).

We are convinced that petitioner is a highly intelligent individual who was very successful in his field of endeavor. His earnings during the years involved were substantial, amounting to $60,073.31 for 1954 and $99,187.23 for 1955. His activities during the years in issue encompassed the sales and leases of parcels of realty which involved millions of dollars. In fact, he consummated somewhere

near sixteen million dollars worth of real estate transactions in 1985 alone. It is a fair inference that petitioner, possessing the business acumen he undoubtedly possessed, could hardly have inadvertently overstated his business expense deductions to the extent that he did. It would be difficult to believe he could have honestly thought his business expenses in 1984 and 1985 were $34,000 and $38,000, respectively, when he filed his returns in view of his admission a few years later that his business expenses for said years were less than half of the reported amounts. We are convinced that he knew what he was doing when he filed the returns and his large overstatements of business expenses were with the willful intent to defeat and evade the tax. Cf. *Joseph Lysaught*, 34 T.C. 1056 (1960), *Joseph H. Wesson*, 14 T.C. 1181 (1950), and *Luciana Pepman*, 31 T.C. 856 (1958).

Petitioner's explanation of the overstatements of deductions for each year is simply "honest mistake." He told a confusing story at the trial that he thought his W-2 forms supplied by Ellman for each year included in the "Total Wages" payments made to third-party lawyers and brokers who participated in his real estate transactions. He characterized these payments as "payments off the top," and said that, in some manner which is not clear, he used them in computing his business deductions for 1984 and 1985. His story about "payments off the top" seems to have been advanced for the first time at the trial and it is not consistent with what he had previously told respondent's representative and his own certified public accountant during the investigation and audit of his 1984 and 1985 returns. While he mentioned "kickbacks" to them, he never fully explained what he meant and claimed his expenses to be items he had spent. Then, at the trial, he admitted that the "payments off the top" that he was referring to were payments made by his employer, Ellman, out of its own funds and not payments that he, himself, had made. His certified public accountant testified that petitioner told him in discussing his business deductions for each year in

estate that "he thought he spent the money" and then later told him that "he had run several or many very costly parties and that he evidently figured that that was a pattern of living during those years, and he made no attempt to build up an amount for a deduction, but took a round figure in each year. That was something that he picked out of a hat." Petitioner also admitted that his descriptions of his business deductions on his 1954 and 1955 returns were inaccurate if his explanation at the trial was to be considered credible.

The inconsistencies that exist in petitioner's explanations and descriptions of his business deductions for each year in issue render his testimony unreliable and not persuasive. The story about the so-called "payments off the top" appears to be an afterthought, not fully developed until he was told by his accountant that he just could not have possibly had the expenses he claimed to have on his 1954 and 1955 returns.

Finally, petitioner's conduct throughout the investigation of both of his returns and on the witness stand was not the best. On more than one occasion respondent's representative had to contact petitioner when petitioner had agreed to contact him. He claimed to have records which he never produced and he was generally misleading. On the witness stand he was evasive and unresponsive to questions addressed to him by respondent's attorney. A failure to fully cooperate with respondent's representative, as here, is also indicative of fraud. Cf. *Jacob D. Farber*, 43 T.C. 407 (1965).

In view of all of the facts in this case we conclude that petitioner's underpayment of taxes for 1954 and 1955 was due, at least in part, to fraud with the intent to evade tax. We cannot believe that petitioner acted innocently and in good faith or that his large overstatements of business expenses were the result of honest mistake. Respondent has met his burden of proof. *Webb v. Commissioner*, 394 F.2d 366 (C.A. 5, 1968), affirming a Memorandum Opinion of this Court.

Our finding of fraud disposes of the issue concerning the statute of limitations.

Petitioner amended his petition to allege that the respondent is estopped from raising the issue of fraud because the U.S. District Court, in a prior criminal tax evasion case for the same years, granted a motion for judgment of acquittal.

There is no merit in this argument. A judgment of acquittal based on a jury verdict in a criminal tax evasion case does not work an estoppel in an action for fraud under section 6653(b) involving a civil liability. See *Helvering v. Mitchell*, 303 U.S. 391 (1938). The result is the same when the judgment of acquittal is based on a granted motion for judgment of acquittal. *United States v. Real Estate Boards*, 339 U.S. 485 (1950). See also 1 Barron & Holtzoff, Federal Practice & Procedure (Criminal), sec. 222 (1951). Rule 29 of the Rules of Criminal Procedure provides the motion for judgment of acquittal should be sustained "if the evidence is insufficient to sustain a conviction." And the Supreme Court has held in *American Tobacco Co. v. United States*, 328 U.S. 781, 787, fn. 4 (1946), that

> The verdict in a criminal case is sustained only when there is "relevant evidence from which the jury could properly find or infer, beyond a reasonable doubt," that the accused is guilty.

Petitioner, relying on *United States v. Feinberg*, 140 F.2d 592 (C.A. 2, 1944), contends that the standard of proof used in a criminal case in the Second Circuit by the Federal courts for ruling on a motion for judgment of acquittal requires no more proof or no higher degree of proof than the standard applicable in a civil case. Petitioner seems to admit that in most other circuits the court must grant the motion for acquittal if the judge reasonably thinks that the evidence for conviction does not meet what can be called the "beyond-a-reasonable-doubt" test. His argument is that in the Second Circuit because of statements in the *Feinberg* case the court must grant the motion for acquittal if the

judge reasonably thinks that the evidence for conviction does not meet the "preponderance" test or the same standard required in a civil case. Based on this rule, which petitioner says exists in the Second Circuit, petitioner argues the judgment of acquittal in the criminal case for tax evasion rests on a finding of lack of preponderance of evidence, the same or a lesser quantum of proof required in the instant case and therefore respondent is estopped by the judgment in the criminal case from asserting fraud in this case.

Petitioner attempts to distinguish *United States v. Real Estate Boards, supra*, by pointing out this was an appeal from the District of Columbia District Court where the standard of proof to be applied in considering a motion for directed verdict of acquittal is the sufficiency of the evidence to overcome any reasonable doubt as to defendant's guilt. He contends the case is not authority for respondent here where the trial was governed by the preponderance evidence rule of the Second Circuit. But neither the opinion of the District Court nor of the Supreme Court indicates the standard of proof required or applied in the consideration of the motion for acquittal.

It must be admitted that an even handed application of the law of estoppel would seem to call for the estoppel preclusion if the first judgment in the earlier case rests on no higher degree of proof than the standard applicable here in this civil case. But we are not convinced there is a real difference between the general rule and the rule that is actually being applied in the Second Circuit with respect to the quantum of proof necessary to defeat a motion for judgment of acquittal in a criminal case. *United States v. Melillo*, 275 F.Supp. 314 (E.D.N.Y., 1967); Moore's Federal Practice, Vol. 8, sec. 29. In the last-cited text the author reviews the proof requirement rule of the Second Circuit that the trial court must apply in passing upon a motion for acquittal and the general rule applied in other circuits. Much authority is cited to show there is probably

no substantive difference between the two rules. The author goes on to state:

> Assuming that there is some substantive difference between the two rules, which is by no means clear, it is doubtful whether the use of one as opposed to the other will materially affect the decision in a given case. * * * *
>
> * * * * *
>
> It is difficult to conceive of a judge who has ever tried a criminal case, or sentenced a defendant, as being unaware of the qualitative difference between criminal and civil cases.[22] It is equally difficult to imagine that the Second Circuit rule was intended to obliterate the difference between the degree of proof required in civil and criminal cases.[23] [Footnotes omitted.]

In *United States v. Melillo, supra,* the court stated: "The question of how much evidence is required to allow a criminal case to go to the jury 'is not entirely free from doubt' in this circuit." However, after reviewing a number of cases the court said that "[t]he rule laid down in the *Feinberg* case appears to have lost its vitality." The court then went on to apply the reasonable doubt test to a motion for judgment of acquittal in a criminal case.

There is no use discussing all of the other cases in the Second Circuit where mention is made as to the quantum of proof necessary to defeat a motion for acquittal. They are not cases involving estoppel. We agree with the statement of the court in *United States v. Melillo, supra,* pp. 318, 319:

> Apart from authority, experience and policy, the language of the Rules of Criminal and Civil Procedure require the court to apply a higher standard in criminal than in civil cases. On the one hand, the motion for a directed verdict, pursuant to Rule 50 of the Civil Rules, or for an involuntary dismissal under Rule 41(b) of the Civil Rules must be granted in the run-of-the-mill civil case if a reasonable juror

> cannot find it more probable than not that the proponent has established his case. On the other hand, Rule 29 of the Criminal Rules requires the court to grant a motion for judgment of acquittal "if the evidence is insufficient to sustain a conviction". It is insufficient, the Supreme Court has told us in *American Tobacco*, if a reasonable juror would have to entertain a reasonable doubt about defendant's guilt. Thus, even if the courts wished to use the same standards in civil and criminal cases, the rules preclude them from doing so.

We are of the opinion that the judgment of acquittal in the criminal case based on section 7201 does not work an estoppel against respondent in this civil case based on section 6653.

We hold that respondent was correct in his determination of deficiencies for 1954 and 1955; petitioner's underpayment of taxes for each of those years was due, at least in part, to fraud with intent to evade tax, and additions to tax for fraud were properly imposed and respondent is not estopped from raising the issue of fraud by a judgment of acquittal in a prior criminal case for tax evasion for the same years.

Decision will be entered for the respondent.

SUPREME COURT, U. S.

In the Supreme Court of the United States

OCTOBER TERM, 1970

ROBERT NEALSEAND, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

JOSEPH M. WALSH,
Assistant Attorney General,

[illegible],
[illegible],
[illegible],
Department of Justice,
[illegible], D.C. [illegible]

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 335

ROBERT NEADERLAND, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. A1-A8) is reported at 424 F. 2d 639. The findings of fact and opinion of the Tax Court (Pet. B1-B17) are reported at 52 T.C. 532.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 1970. The petition for writ of cer-

tiorari was filed on June 30, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, after taxpayer's acquittal on motion for directed verdict of criminal charges of willful tax evasion, the doctrine of collateral estoppel precluded the Commissioner from proving in the Tax Court that the taxpayer's underpayments of tax in the same years were due to fraud.

STATUTES INVOLVED

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 6653. FAILURE TO PAY TAX.

* * * * *

(b) *Fraud.*—If any part of any underpayment (as defined in subsection (c)) of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 50 percent of the underpayment. In the case of income taxes and gift taxes, this amount shall be in lieu of any amount determined under subsection (a).

* * * * *

SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

STATEMENT OF THE CASE

On April 11, 1961, petitioner was indicted in the United States District Court for the Southern District of New York in a two-count indictment charging that he had willfully attempted to evade his federal income taxes for 1954 and 1955 by filing false and fraudulent returns, in violation of Section 7201 of the Internal Revenue Code of 1954.[1] In a jury trial, the district court on March 15, 1965, granted petitioner's motion for acquittal at the conclusion of the Government's case (Pet. B8). In 1966, the Commissioner determined tax deficiencies and fraud penalties (disallowing most of the claimed business expenses for each year), and the Tax Court subsequently sustained the Commissioner as to both the deficiencies and the penalties (Pet. A3, B14).

The only issue presented in the court of appeals was whether the prior acquittal on the criminal charge barred a finding of fraud in the subsequent civil proceeding in the Tax Court. The court of appeals, agreeing with the Tax Court, concluded that estoppel did not apply and affirmed the Tax Court's decision (Pet. A3).

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[1] During 1954 and 1955 petitioner was employed as a real estate broker-salesman, earned commissions of $58,573.31 and $96,307.23, and claimed business expense deductions of $31,000 and $38,000 for the respective years. In 1962, petitioner filed amended returns for 1954 and 1955, in which he reduced his claimed business expenses to $12,176.33 and $17,909.13, respectively. (Pet. A2.)

ARGUMENT

Petitioner's sole contention is that his acquittal on criminal charges of wilful tax evasion collaterally estopped the Commissioner from seeking the civil fraud penalties of Section 6653(b) for petitioner's underpayments of tax in the years for which the prosecution had been brought. This contention is not persuasive, and there is no conflict of authority involved.

Almost the identical contention was made to and rejected by this Court in *Helvering* v. *Mitchell*, 303 U.S. 391, and *United States* v. *Real Estate Boards*, 339 U.S. 485. In *Mitchell*, the Court held that a taxpayer's prior acquittal, by jury verdict, of willful attempt to evade the income tax did not estop the Commissioner from later proving in the Board of Tax Appeals that the tax return in question was fraudulent or from collecting the resulting 50 percent fraud penalties. The Court found the acquittal ineffective to create an estoppel because of the difference between the required degrees of proof in criminal and civil cases; thus, identical proof might fail in a criminal case but suffice in a civil case. 303 U.S. at 397.[2]

In *United States* v. *Real Estate Boards*, *supra*, the Court relied upon *Helvering* v. *Mitchell*, *supra*, to

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[2] Petitioner (Pet. 4-6) relies upon *Coffey* v. *United States*, 116 U.S. 436, for an opposite result. But this Court distinguished *Coffey* in *Mitchell*, *supra*, pp. 405-406, on the ground that the 50 percent fraud penalty, unlike the liquor-violation forfeiture in *Coffey*, is remedial rather than punitive. It thus construed *Coffey*, as resting on the principle of double jeopardy. See also, 1B Moore, *Federal Practice* (2d ed.), par. 0.418[3], pp. 2854-2856.

reach the same result although the prior acquittal had resulted, not from a jury verdict but, as here, but from the granting of a motion for acquittal, "apparently * * * under Rule 29 of the Federal Rules of Criminal Procedure." 339 U.S. at 493, fn. 7. Rule 29 then provided, and still provides, that a motion for acquittal shall be granted "if the evidence is insufficient to sustain a conviction of such offense or offenses"; the Court concluded that the "ruling on [the motions] did not determine whether by the lesser degree of proof required in a civil case appellees might be found to have conspired to fix commissions" (*Ibid.*).

Petitioner seeks to avoid the holdings in *Mitchell* and *Real Estate Boards* by quoting (Pet. 8) from the opinion of the court of appeals below, to the effect that "in this Circuit" the trial judge was required to submit the case to the jury "unless the prosecution has failed to present 'substantial evidence' to support a guilty verdict" (Pet. A6). The court of appeals preferred to rely on other grounds, but it should be observed that, whatever differing verbal formulas may be used to describe a trial court's duty with respect to a motion for acquittal, it is probable that a trial judge in a criminal case will subject the evidence to a more severe test on such a motion than he would apply in a civil case. See 8 Moore, *op. cit.*, par. 29.06 (1969 Cum. Supp.), p. 29-27. In fact, as the Tax Court noted (Pet. B16-B17), a district judge in the Second Circuit—the circuit of decision here—has *expressly* refused to apply a civil test in a criminal case. See *United States* v. *Melillo*, 275 F. Supp. 314, 318

(E.D. N.Y.), where the court interpreted Rule 29, supra, as requiring "a higher standard in criminal than in civil cases." Clearly, one who invokes estoppel has the burden of showing the relevance of the prior decision; yet petitioner has failed to demonstrate what test in fact was applied by Judge Sugarman in granting his motion for acquittal.

In any event, this Court did not purport to exhaust the distinctions between civil and criminal cases in its opinions in *Mitchell* and *Real Estate Boards, supra.* Here, the court of appeals rejected (Pet. A5) petitioner's contention on the basis of *Commissioner* v. *Sunnen*, 333 U.S. 591, 599-600, 602, where this Court held that collateral estoppel is confined to situations where, *inter alia*, "the controlling facts and applicable legal rules remain unchanged" and the second case involves substantially "the same bundle of legal principles that contributed to the rendering of the first judgment." The court of appeals observed that here the "bundle of legal principles" was significantly different in the Tax Court case, as compared with the criminal case:

> For example, the Government could not, in the criminal action, call Neaderland to the witness stand and examine him, though it was not barred from doing so in the subsequent civil case and thereby brought out highly probative evidence on the issue of fraud. * * * [Pet. A7].

The court also noted that the government had no right of appeal in the criminal case "to challenge the possibly erroneous standard which the trial judge ap-

plied in dismissing the case." (Pet. A8.)[3] These differences, which work against the government and in favor of the accused, explain why it would not be "even-handed" to impose collateral estoppel on the government to match that faced in civil proceedings by an accused once he is *convicted* of criminal charges. *Ashe* v. *Swenson*, 397 U.S. 436, applied the doctrine of collateral in a second *criminal* proceeding, and thus is inapposite here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JOHNNIE M. WALTERS,
Assistant Attorney General.

JOSEPH M. HOWARD,
JOHN M. BRANT,
Attorneys.

JULY 1970.

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[3] As between two civil cases, the Restatement of the Law of Judgments, American Law Institute (1942), Sec. 69(2), adopted the following rule:

§ 69. *Effect of Appeal or Inability to Appeal.*

* * * *

(2) Where a party to a judgment cannot obtain the decision of an appellate court because the matter determined against him is immaterial or moot, the judgment is not conclusive against him in a subsequent action on a different cause of action.

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